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DELTA DRIVE (M) SDN BHD

v.

HONG LEONG FINANCE BHD

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COURT OF APPEAL, PUTRAJAYA
DENIS ONG JCA
MOHD GHAZALI YUSOFF JCA
ARIFFIN JAKA JCA
[CIVIL APPEAL NO: J-02-337-1999]

C

4 MAY 2007

COMPANY LAW: *Winding-up - Petition - Application by appellant for adjournment of hearing disallowed - Whether application ought to have been granted - Whether appellant deprived of right to file affidavit in*

D

opposition to petition - Companies (Winding-up) Rules 1972, rr. 30(1), 193

The appellant, an incorporated company that owed the respondent finance company a sum amounting to RM3,908,860.31 as at 26 January 1998, was served a notice pursuant to s. 218 of

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the Companies Act 1965 by the respondent. Under the notice, the appellant was required to pay the respondent the outstanding sum within 21 days from the date of service. Upon the appellant's non-payment, the respondent presented a petition to wind up the

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appellant. The indorsement on the undated petition showed that it was presented to the court on 26 November 1998 and the senior assistant registrar thereupon ordered that it be heard on 22 February 1999. By a letter dated 10 February 1999, the appellant served on the respondent a copy of a notice of intention to

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appear and of its intention to raise a preliminary objection, namely, that there was non-compliance with r. 26 of the Companies (Winding-up) Rules 1972 ('Rules') on the respondent's part. The appellant, however, failed to file any affidavit in opposition to the petition within the time specified in r. 30(1) of the Rules when the

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matter came up for hearing on 22 February 1999. The learned Judicial Commissioner ('JC') ruled that although there was non-compliance, the matter could be rectified by the re-swearing of the affidavit verifying the petition, and ordered the respondent to do as such. The appellant did not appeal against that order. The

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respondent re-filed its affidavit verifying the petition on 30 March

1999 and the petition came up for hearing on 12 April 1999; the appellant had yet to file an affidavit in opposition up to that date. At the outset of the hearing of the petition, the appellant applied for an adjournment on the ground that it did not receive the notice informing it of the hearing date. The appellant also orally applied for an abridgement of time to file an affidavit in opposition to the petition. The learned JC refused the applications and went on to hear the petition, consequently granting the order of winding-up. Hence, the present appeal by the appellant.

Held (dismissing the appeal)
Per Mohd Ghazali Yusoff JCA delivering the judgment of the court:

(1) The power to grant an adjournment of the hearing of any matter or any trial is discretionary. In this instance, a review of the appeal record and minutes of the proceedings of the court below satisfied this court that any reasonable tribunal similarly circumstanced would not have granted the adjournment. The circumstances surrounding the refusal to grant the adjournment were clear. The appellant failed to comply with r. 30(1) of the Rules in not filing an affidavit in opposition to the petition when the matter first came up for hearing on 22 February 1999. When the matter was adjourned by the court on 24 March 1999, after the learned JC had made his ruling on the preliminary objection to enable the petitioner to reaffirm or re-swear the affidavit verifying the petition within ten days from that date, the appellant did not seem to have made any attempt to file an affidavit in opposition to the petition by applying for an abridgement of time under r. 193 of the Rules. There was ample time to do so as the respondent filed its affidavit verifying the petition on 30 March 1999. The question arising was why the appellant only deemed it fit to make an oral application for abridgment of time when the petition came up for hearing on 12 April 1999. (para 23)

(2) In the instant case, the learned JC had written quite a lengthy judgment in relation to the preliminary objection. The appellant did not file an appeal against that decision but yet again raised more procedural issues when the petition came up once again for hearing on 12 April 1999, namely, on its right to be given an abridgment of time to file an affidavit in opposition as it did

not receive any notification from the High Court Registry informing it of that hearing date and hence "did not have the time fixed under r. 30(1) of the Rules in order to file its affidavit in opposition to the petition". In addition, the appellant raised the issue that the petition was defective in that it was undated. The appeal record in this instant case only contained the learned JC's grounds of decision with regard to the preliminary objection. Be that as it may, in the grounds of decision, the learned JC had dealt with this issue and in light of that and there being no appeal against his ruling, it could not be fathomed why the appellant had deemed it fit to raise the same issue again in the court below at the hearing on 12 April 1999 and again at this appeal. (paras 24, 25 & 26)

(3) In conclusion, the learned JC had not erred in refusing an adjournment of the hearing of the petition and in proceeding to hear it and, consequently, granting the order of winding-up. The petition showed that the appellant never disputed the debt. As a general rule, winding-up proceedings should be heard expeditiously even where a company is solvent (*Re Pek Chuan Development Pte Ltd* (foll)). In the present case, the appellant was already in breach of r. 30(1) of the Rules when the petition came up for hearing on 22 February 1999. The appellant could not now complain that it had been deprived of its right to file an affidavit in opposition to the petition when the learned JC disallowed its application for adjournment of the hearing on 12 April 1999. (paras 27, 28 & 29)

Bahasa Malaysia *translation of headnotes*

Perayu, sebuah syarikat diperbadankan yang berhutang dengan syarikat kewangan responden sebanyak RM3,908,860.31 setakat 26 Januari 1998, telah diserahkan dengan notis s. 218 Akta Syarikat 1965 oleh responden. Berdasarkan notis, perayu dikehendaki membayar balik jumlah terhutang dalam masa 21 hari dari tarikh penyerahan. Perayu gagal membayar dan responden mengemukakan petisyen untuk menggulung perayu. Indorsmen pada petisyen tidak bertarikh menunjukkan bahawa ianya dikemukakan kepada mahkamah pada 26 November 1998 dan berikutnya penolong kanan pendaftar memerintahkan supaya ia didengar pada 22 Februari 1999. Melalui surat bertarikh 10

Februari 1999, perayu menyerahkan kepada responden sesalinan notis niat untuk hadir dan niat untuk membangkitkan bantahan awal, iaitu bahawa terdapat ketidakpatuhan di pihak responden terhadap k. 26 Kaedah-kaedah Syarikat (Penggulungan) 1972 ('Kaedah'). Perayu, bagaimanapun, gagal memfailkan afidavit penentangan terhadap petisyen dalam tempoh yang ditetapkan oleh k. 30(1) Kaedah apabila kes didengar pada 22 Februari 1999. Yang arif Pesuruhjaya Kehakiman ('PK') memutuskan bahawa walaupun terdapat ketidakpatuhan, hal itu boleh diperbetul melalui pengikraran semula afidavit menentusahkan petisyen, dan berikutnya memerintahkan supaya responden berbuat demikian. Perayu tidak merayu terhadap perintah ini. Responden telah memfail semula afidavit menentusahkan petisyennya pada 30 Mac 1999 dan petisyen tersebut didengar pada 12 April 1999; apapun, pada tarikh itu perayu masih tidak memfailkan afidavit penentangannya. Di pendengaran petisyen, perayu memohon penangguhan atas alasan bahawa ia tidak menerima notis memberitahunya mengenai tarikh pendengaran. Perayu juga memohon secara lisan untuk satu lanjutan masa bagi membolehkannya memfail afidavit penentangan terhadap petisyen. Yang arif PK menolak permohonan-permohonan dan meneruskan pendengaran petisyen dan seterusnya membenarkan perintah penggulungan. Ini adalah rayuan perayu terhadap keputusan tersebut.

Diputuskan (menolak rayuan)

Oleh Mohd Ghazali Yusoff HMR menyampaikan penghakiman mahkamah:

(1) Kuasa untuk membenarkan penangguhan pendengaran sesuatu halperkara atau perbicaraan adalah satu kuasa budibicara. Dalam kes ini, setelah menyemak rekod rayuan dan minit-minit prosiding mahkamah di bawah, mahkamah ini berpuashati bahawa mana-mana tribunal yang munasabah yang berada dalam keadaan yang sama tidak akan membenarkan penangguhan. Halkeadaan yang mempengaruhi keengganan membenarkan penangguhan adalah jelas. Perayu tidak mematuhi k. 30(1) Kaedah kerana gagal memfailkan afidavit penentangan apabila halperkara mula didengan pada 22 Februari 1999. Apabila halperkara ditangguh oleh mahkamah kepada 24 Mac 1999, selepas yang arif PK membuat keputusan mengenai bantahan awal bagi membolehkan pempetisyen mengesah atau mengikrar

semula afidavit menentusahkan petisyen dalam masa sepuluh hari dari tarikh itu, perayu masih tidak berbuat apa-apa bagi memfailkan afidavit penentangan terhadap petisyen seperti memohon perlanjutan masa di bawah k. 193 Kaedah. Terdapat banyak masa untuk berbuat demikian memandangkan responden hanya memfailkan afidavit menentusahkan petisyennya pada 30 Mac 1999. Persoalan yang berbangkit adalah, kenapakah setelah petisyen dipanggil untuk perbicaraan pada 12 April 1999 barulah perayu merasa terpanggil untuk membuat permohonan lisan memohon perlanjutan masa.

(2) Dalam kes ini, yang arif PK telah menulis alasan yang agak panjang lebar mengenai bantahan awal. Perayu tidak memfailkan rayuan terhadap keputusan tersebut, namun begitu telah membangkitkan banyak isu-isu prosedur sewaktu petisyen mula didengar pada 12 April 1999, iaitu, berkaitan haknya untuk diberi perlanjutan masa untuk memfail afidavit penentangan disebabkan ia tidak menerima notis dari Bahagian Pendaftaran Mahkamah Tinggi memberitahunya mengenai tarikh pendengaran dan kerana itu "tidak memperoleh masa seperti yang ditetap di bawah k. 30(1) Kaedah bagi membolehkannya memfail afidavit penentangan terhadap petisyen". Selain itu, perayu membangkitkan isu bahawa petisyen adalah cacat kerana tidak bertarikh. Rekod rayuan dalam kes ini hanya mengandungi keputusan yang arif PK berhubung dengan bantahan awal. Walau apapun, dalam alasan penghakimannya, yang arif PK telah menangani isu ini, dan mengambilkira perkara tersebut serta fakta bahawa tiada rayuan dibuat terhadap keputusannya, maka adalah sukar difahami mengapa perayu merasakannya wajar untuk membangkitkan lagi isu ini di mahkamah di bawah pada pendengaran 12 April 1999 dan sekali lagi pada rayuan ini.

(3) Pada konklusinya, yang arif PK tidak khilaf dalam menolak penangguhan pendengaran petisyen serta dalam meneruskan pendengaran dan membenarkan perintah penggulungan. Petisyen menunjukkan bahawa perayu tidak pernah mempertikaikan hutang. Sebagai kaedah am, prosiding penggulungan patut didengar secepat mungkin walaupun syarikat masih solven (*Re Pek Chuan Development Pte Ltd* (diikuti)). Dalam kes semasa, perayu telah melanggar k. 30(1) Kaedah apabila petisyen mula didengar pada 22 Februari

1999. Perayu tidak boleh kini merungut bahawa ia telah dilucutkan haknya untuk memfail afidavit penentangan terhadap petisyen memandangkan permohonannya untuk menangguh pendengaran 12 April 1999 telah pun ditolak oleh yang arif PK.

Case(s) referred to:

Maril-Rionebel (M) Sdn Bhd & Anor v. Perdana Merchant Bankers Bhd & Other Appeals [2001] 3 CLJ 248 CA ***(refd)***

Re Mohd Shariff Sapie, ex p Malayan Banking Bhd [1992] 2 MLJ 102 ***(refd)***

Re Pek Chuan Development Pte Ltd [1988] 3 MLJ 140 ***(foll)***

Sari Atlantic Sdn Bhd v. Aik Kim Enterprise [1988] 1 MLJ 201 ***(refd)***

Taylors Industrial Flooring Ltd v. M & H Plant Hire (Manchester) Ltd [1990] BCLC 216 ***(refd)***

Teck Yow Brothers Hand-Bag Trading Co v. Maharani Supermarket Sdn Bhd [1989] 1 CLJ 258; [1989] 2 CLJ (Rep) 555 HC ***(refd)***

Legislation referred to:

Companies Act 1965, ss. 218, 221(2)

Companies (Winding-up) Rules 1972, rr. 26, 30(1), 193, 194

For the appellant - Chang Tan Sian (Wong You Fong with him); M/s Henry Soong & Chang

For the respondent - Cheng Chang Chai (Ling Chee Wei with him); M/s Iqbal, Hakim, Sia & Voo

[Appeal from High Court, Johor Bahru; Companies Winding-up Petition No: 28-238-1998]

Reported by Suresh Nathan

JUDGMENT

Mohd Ghazali Yusoff JCA:

[1] The appellant (the respondent in the court below) was incorporated on 7 November 1995 and has an authorised capital of RM500,000 divided into 500,000 shares of RM1 each. Its paid-up capital is RM250,000. The appellant was indebted to the respondent, a finance company (the petitioner in the court below) in the sum of RM3,908,860.31 as at 26 January 1998.

[2] On 24 June 1998 the respondent's solicitors served on the appellant a notice pursuant to s. 218 of the Companies Act 1965 by leaving it at its registered office. Under the said notice, the

appellant was required to pay to the respondent the said sum of RM3,908,860.31 within 21 days from the date of service. The appellant did not make any payment. On 26 November 1998 the respondent presented to the court a petition to wind up the appellant.

[3] In the petition, the respondent contended that the appellant made several admissions and acknowledgment of the correctness of the outstanding debt it owed to the respondent and undertook to make all payments due. The appellant had also by letters to the respondent dated 24 January 1998 and 6 March 1998 requested for time to settle the outstanding debt due and owing. Notwithstanding those requests, the appellant failed to pay the said sum of RM3,908,860.31 or any part thereof. As such, the respondent aver that the appellant is unable to pay its debts and that in the circumstances, it is just and equitable that the appellant be wound-up.

[4] The indorsement on the petition – the petition was not dated – showed that it was presented to the court on 26 November 1998 and the senior assistant registrar thereupon ordered that it be heard on 22 February 1999. By letter dated 10 February 1999, the appellant's solicitors served on the respondent's solicitors a copy of a notice of intention to appear and of their intention to raise a preliminary objection, namely, that there was non-compliance with r. 26 of the Companies (Winding-up) Rules 1972 on the part of the respondent. Rule 26 of the Companies (Winding-up) Rules 1972 ("the rules") provides:

> Every petition for the winding-up of a company by the Court shall be verified by an affidavit referring thereto. The affidavit in Form 7 shall be made by the petitioner or by one of the petitioners, if more than one, or, in case the petition is presented by a corporation, by some director, secretary or other principal officer thereof and **shall be sworn after and filed within four days after the petition is presented,** and the affidavit shall be *prima facie* evidence of the statements in the petition. (emphasis added)

[5] It would be appropriate to mention at this stage that r. 30 of the rules provides as follows:

(1) Affidavits in opposition to a petition that a company may be wound up shall be filed and a copy thereof served on the petitioner or his solicitor at least seven days before the time appointed for the hearing of the petition.

(2) Any affidavit in reply to an affidavit filed in opposition to a petition (including a further affidavit in support of any of the facts alleged in the petition) shall be filed within three days of the date of service on the petitioner of the affidavit in opposition and a copy of the affidavit in reply shall be forthwith served on the opposing petitioner or his solicitor.

[6] It would also be appropriate to mention here that the appellant did not file any affidavit in opposition to the petition within the time specified in r. 30(1) of the rules when the matter came up for hearing on 22 February 1999.

[7] At the outset of the hearing on 22 February 1999 before the learned judicial commissioner, in relation to the preliminary objection, learned counsel for the appellant pointed out that the petition and the affidavit verifying the petition were both dated 26 November 1998 which would denote that the respondent failed to comply with the r. 26 of the rules which requires that that affidavit shall be sworn after and filed within four days after the petition is presented. Learned counsel for the appellant argued that since that affidavit was filed together with the petition, the implication was that the affidavit was sworn earlier. It was also pointed out to the court by a representative from the official assignee's office who was present at the hearing that the petition was not dated. As regards the actual date of the petition, learned counsel for the respondent contended that the date of filing, ie, 26 November 1998 shall be the date of the petition.

[8] In relation to the preliminary objection, the learned judicial commissioner adjourned the hearing to 13 March 1999 to hear further arguments and subsequently reserved his decision. He then delivered his decision on 24 March 1999. In his grounds of decision, he said that he was of the view that a petition and the affidavit verifying the petition cannot be filed contemporaneously as it is provided in r. 26 of the rules that the affidavit "shall be sworn after and filed within four days after the petition is presented" and as such he has to determine whether the affidavit verifying the petition in the instant case, being dated the same day as the

petition, breached r. 26 of the rules as it was filed on the same day as the petition. After making reference to several authorities, including *Re Mohd Shariff bin Sapie, ex p Malayan Banking Bhd* [1992] 2 MLJ 102 and *Sari Atlantic Sdn Bhd v. Aik Kim Enterprise* [1988] 1 MLJ 201, the learned judicial commissioner ruled that there is nothing wrong with the petition and that the matter can be rectified by the re-swearing of the affidavit verifying the petition. He said (p 35 of the appeal record):

> It is therefore the view of this court that the premature swearing or affirming of the affidavit verifying petition on 26th November, 1998 was a mere irregularity and curable by this court as no injustice has been caused to the company.

[9] The learned judicial commissioner then ordered that the respondent be allowed to reaffirm or re-swear the affidavit verifying the petition within 10 days with costs to be paid by the respondent. We noted that the appellant did not appeal against this order of the court. Be that as it may, we are of the view that the learned judicial commissioner was correct in making that order. *Re Mohd Sharif bin Sapie* and *Sari Atlantic Sdn Bhd* referred to above would lend support to that order. In *Re Mohd Sharif bin Sapie*, VC George J said (at p. 105):

> With respect I cannot accept the proposition that because the affidavit verifying the petition was sworn to before the petition was presented the effect was that the petition was vitiated. In winding-up petitions, r. 26 itself makes it clear that the petition has to be presented before the verifying affidavit is sworn. The presentation of the petition has to be and is an act independent of the verifying affidavit. Whether the affidavit was sworn before or after the presentation or whether it was sworn at all is of no consequence *vis-a-vis* the 'birth' of the petition. On presentation it is born. The acts of swearing of the affidavit and the filing of it are by the terms of r. 26 postnatal and not antenatal.
>
> Where the verifying affidavit in contravention of r. 26 is sworn to before the petition is presented or is filed after the prescribed four days it is the affidavit (and not the petition) that amounts to nothing, which in fact was what was succinctly stated by the Master of the Rolls in the said passage from Western Benefit Building Society that was quoted in Sobri bin Arshad. It is relevant to note that Sir John Romly MR, having stated that the affidavit amounted to nothing, went on to state that such an affidavit sworn to before the petition was presented 'must be

resworn and the order dated subsequently' – clearly he found nothing wrong with the petition itself and was of the opinion that the omission of an affidavit sworn in terms required by the rule could be rectified by a reswearing of the affidavit and that the order sought by the petition could be made thereafter. No doubt an order extending the time to file the verifying affidavit has to be obtained because of the four days prescribed by r. 26, and r. 193 empowers the court to grant such an order in a proper case.

[10] In *Sari Atlantic Sdn Bhd (supra)*, a petition was presented to the court to wind up the respondent company. However, the affidavit verifying the petition was affirmed about four days before the presentation of the petition itself, which was a clear failure to comply with r. 26 of the rules. At the hearing of the petition, the respondent company contended that the non-compliance was a fatal defect and that the petition must be rejected as this court had no power to cure such a defect. The court rejected the contention by the respondent company and held as follows:

(a) that non-compliance with r. 26 of the rules does not render the petition a nullity and is curable by the court;

(b) that s. 221(2) of the Companies Act 1965 allows the court to cure a technical error which does no injustice to the respondent company.

[11] In his grounds of decision, Lim Beng Choon J said (at pp. 202-203) as follows:

A similar approach was followed in the case of *Sam Hin Timber Co v. Perusahaan Sri Duyong Sdn Bhd.* There it was held that a premature swearing or affirming of an affidavit verifying the petition was a mere irregularity curable by the granting of an extension of time and compensating the victim with costs. From these three authorities I am therefore of the view that besides the discretionary power given to this court under the said rules 193 and 194, the Companies Act itself under the provisions of section 221(2) which read as follows:

> The court may on the petition coming on for hearing or at any time on the application of the petitioner, the company or any person who has given notice he intends to appear on the hearing of the petition:

A (a) [not applicable]

(b) dispense with any notices being given or steps being taken which are required by this Act, or by the rules, or by any prior order of the Court

B (c) [not applicable]

(d) [not applicable]

(e) allow the petition to be amended or withdrawn; and

C (f) give such direction to the proceedings as the court thinks fit.; ...

allows this court to cure what I may say is merely a technical error which does no injustice to the respondents. In view of the above I will allow an extension of time to D the petitioner to reswear an affidavit to verify the facts and the filing and serving of such affidavit before the hearing of this petition. The Company is of course entitled to costs and I do order that costs of the proceedings up to the date of this judgement shall be paid by the petitioner to the Company.

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[12] Rules 193 and 194 of the rules read as follows:

193. The court may, in any case in which it shall see fit extend or abridge the time appointed by these Rules or fixed by any F order of the court for doing any act or taking any proceeding.

194. (1) No proceeding under the Act or the Rules shall be invalidated by any formal defect or any irregularity, unless the court is of the opinion that substantial injustice has been caused by the defect or irregularity, and that the injustice cannot be G remedied by any order of the court.

(2) No defect or irregularity in the appointment or election of a receiver, liquidator or member of a committee of inspection shall vitiate any act done by him or in good faith.

H **[13]** As a result of the order of the court in the instant case, the respondent re-filed its affidavit verifying the petition on 30 March 1999. The petition consequently came up again for hearing on 12 April 1999. We noted that up to that date, the appellant had yet to file an affidavit in opposition.

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[14] At the outset of that hearing of the petition on 12 April 1999, learned counsel for the appellant applied for an adjournment on the ground that the appellant did not receive from the High Court Registry the notice informing them of that hearing date. He claimed that he was only informed of the date of hearing *vide* letter dated 7 April 1999 from the respondent's solicitors. He then made an oral application for an abridgement of time to file an affidavit in opposition to the petition. Both these applications were opposed by learned counsel for the respondent. After hearing arguments, the learned judicial commissioner refused the applications and went on to hear the petition. After hearing submissions on the petition proper he granted the order of winding up as prayed for. The appellant appealed.

[15] The grounds of appeal as found in the memorandum of appeal are as follows:

(i) that the appellant's application for an adjournment of the hearing of the petition on 12 April 1999 ought to have been allowed in view of the fact that the appellant did not receive from the High Court Registry the notice of the hearing date;

(ii) that the appellant was only informed of the date of the hearing of the petition *vide* letter dated 7 April 1999 from the respondent's solicitors;

(iii) that as the appellant was only informed of that hearing date very much later, the appellant's application for an abridgement of time to file an affidavit in opposition to the petition ought to have been allowed;

(iv) that the original hearing date of the petition, *viz.*, 22 February 1999 cannot be taken into consideration as the learned judicial commissioner had ordered that the affidavit verifying the petition has to be re-sworn and filed again;

(v) that the learned judicial commissioner had failed to take into account that the petition was defective, it being undated.

[16] It was our unanimous decision that this appeal be dismissed with costs. We had also ordered that the deposit be remitted to the respondent towards the account of taxed costs.

[17] We find no merits in this appeal. We have perused the appeal record and noted that the debt was not disputed by the appellant. Documentary evidence adduced showed that the appellant owed a company called Wei Sin Construction Sdn Bhd an outstanding amount of RM3,908,860.31 as at 28 October 1997. Wei Sin Construction Sdn Bhd had under an arrangement with the respondent assigned all its present and future receivables due from the appellant to the respondent and gave notice to the appellant. The appellant had on 3 November 1997 acknowledged that it had notice of the assignment between the respondent and Wei Sin Construction Sdn Bhd and confirmed that the said outstanding amount as it stood was correct and affirmed that it will make all payment under the arrangement to the respondent. A letter from Wei Sin Construction Sdn Bhd to the appellant and copied to the respondent, which is self-explanatory, clearly confirmed the existence and acceptance of the arrangement between the parties. It reads:

> Delta Drive (M) Sdn Bhd
> C/0 2, Kovan Road
> # 01-02 Simon Plaza
> Singapore 548008.
>
> Dear Sir,
>
> Re: Notice Of Assignment Of Bills/Certificates Of Payment Under Contract For Lot 1610, Taman Gembira, Mukim Tebrau, Daerah Johor Bahru
>
> Contractor: Wei Sin Construction Sdn Bhd
>
> We are pleased to inform you that we have acquired the services of Hong Leong Finance Bhd (HLFB) as Credit Factor who under our arrangement with them have been assigned ALL our present and future receivables due from you under the abovecaptioned contract (The Contract).
>
> Under the assignment to HLFB which takes immediate effect, all payment by you in respect of our bills/certificates of payment issued under the contract shall be made directly to:

Hong Leong Finance Bhd
Level 1, Wisma Hong Leong
18, Jalan Perak
50450 Kuala Lumpur
Tel: 03-2643939 Fax: 03-2642831

Only payment in full to HLFB will constitute a proper discharge of your debts and we shall have no claims against you in respect thereof. Any credit notes or any other discharge by us of your obligation to make payment under the bills/certificates of payment must bear HLFB's endorsement to be valid.

You should immediately pay and continue to pay HLFB all sums due in respect of all bills/certificates of payment issued under the contract as and when the same become due and payable, until such time as HLFB shall notify you writing to the contrary.

Kindly confirm that the outstanding amount of RM3,980,860.31 as at 28th October 1997 due from you to us in respect of the bills/certificates of payment under the contract is correct. Please refer to Assignment Schedule enclosed herewith.

We apologise for any inconvenience caused by this notice of assignment but we assure you that the arrangement we have entered with HLFB will enable us lo serve your needs more efficiently.

Yours sincerely,

Wei Sin Construction Sdn Bhd.

[18] The appellant consequently on 3 November 1997 acknowledged the outstanding amount due as being correct by endorsing on the above letter as follows:

We acknowledge that we have notice of the assignment between HLFB and Wei Sin Construction Sdn Bhd and confirm that the outstanding amount is correct. We shall make all payment under the contract to HLFB.

DELTA DRIVE (M) SDN BHD.

[19] Subsequently, the appellant in their letters to the respondent dated 24 January 1998 and 6 March 1998 respectively requested for time to make payment to the respondent. A "statement of account" dated 31 May 1998 showing that as at 1 May 1998 the outstanding balance owed by the appellant was RM3,908,860.31 was also exhibited by the respondent.

[20] The facts clearly showed that the appellant knew that the petition will be heard on 22 February 1999 as far back as 10 February 1999 when it served on the respondent its notice of intention to appear and simultaneously gave notice of its intended preliminary objection. Thus under r. 30(1) of the rules the appellant had ample time then to file an affidavit in opposition to the petition. The appellant chose not to do so. With respect to learned counsel for the appellant, we cannot see how an intention to raise a preliminary objection at the hearing of a petition to wind up would operate as a stay in the sense that a respondent need not file an affidavit in opposition until the outcome of its proposed preliminary objection. On this issue of non-filing of an affidavit in opposition, learned counsel for the appellant contended in the court below that if it had filed the affidavit it would be tantamount to saying that the affidavit verifying the petition was in order. Again with respect to learned counsel for the appellant, we cannot see how this can be canvassed under the circumstances when r. 30(1) of the rules clearly provides that an affidavit in opposition to wind up shall be filed and a copy thereof served on the petitioner or his solicitor at least 7 days before the date fixed for the hearing of the petition. It is preposterous to suggest that one need not comply with r. 30(1) of the rules if one is raising such a preliminary objection.

[21] As discussed earlier, on 22 February 1999, the court ordered that the petitioner be allowed to re-affirm or re-swear the affidavit verifying petition. The appellant did not appeal against that order. Subsequently the petition came for hearing on 12 April 1999 before the same judicial commissioner. At the outset of that hearing, learned counsel for the appellant requested for an adjournment on the ground that the appellant was given insufficient time to file an affidavit in opposition as it did not receive any notice from the High Court Registry and was only informed by the respondent's solicitor of the date of hearing of the petition on 7 April 1999. In addition to that request, he applied

for an abridgment of time to file an affidavit in opposition and also pointed out that the petition itself was defective as it was not dated.

[22] The learned judicial commissioner disallowed the appellant's applications for adjournment and abridgment of time to file the affidavit in opposition and consequently went on to hear the petition. After hearing the parties on the petition proper he granted the order of winding up. The appellant has now appealed to this court complaining that the learned judicial commissioner should have granted the adjournment and allowed that time be abridged for the appellant to file an affidavit in opposition to the petition. The appellant is also complaining that the learned judicial commissioner, in granting the order of winding up failed to take into account that the petition was defective.

[23] We are of the view that the power to grant an adjournment of the hearing of any matter or any trial is discretionary. We had reviewed the appeal record and minutes of the proceedings of the court below and were satisfied that any reasonable tribunal similarly circumstanced would not have granted the adjournment. The circumstances surrounding the refusal to grant the adjournment were clear. The appellant failed to comply with r. 30(1) of the rules when it did not file an affidavit in opposition to the petition when the matter first came up for hearing on 22 February 1999. When the matter was adjourned by the court on 24 March 1999, after the learned judicial commissioner had made his ruling on the preliminary objection to enable the petitioner to reaffirm or re-swear the affidavit verifying the petition within 10 days from that date, the appellant did not seem to have made any attempt to file an affidavit in opposition to the petition by applying for an abridgment of time under r. 193 of the rules. There was ample time to do so as the respondent re-filed its affidavit verifying the petition on 30 March 1999. The question arising is why did the appellant only deemed it fit to do so and at that by making an oral application for abridgment of time when the petition came up again for hearing on 12 April 1999? In relation to this, we were referred to a passage in *Maril-Rionebel (M) Sdn Bhd & Anor v. Perdana Merchant Bankers Bhd and Other Appeals* [2001] 3 CLJ 248 where Gopal Sri Ram JCA in dealing with applications, not dissimilar to the applications in the instant case, raised by practitioners at different stages of the same proceedings has this to say (at pp. 256-257):

A There is a trend – and it is an unhealthy trend – for practitioners to raise several points either on several different applications, or by way of preliminary objections on procedural grounds to the same proceeding. As each application or point of objection fails, an appeal is at once lodged, and the aid of this court is sought B to stay all proceedings in the court below pending the hearing of the appeal against the spurious procedural objection. Let me say at once that such a practice constitutes an abuse of the court's process, leads to injustice and should not be countenanced by judges. A litigant who has a number of procedural and substantive grounds in opposition to any cause or matter, must take all of C them in one go. He cannot present his case in instalments. He cannot take one procedural point at a time and invite a separate ruling from the presiding judge. This type of advocacy which has been on the rise over the past few years results in serious delays in the various stages of litigation. Judges at first instance and magistrates are therefore advised not to entertain these so called D preliminary objections, save and except where they go to the jurisdiction of particular court.

Take this very case. Each appeal before us is directed against each of the steps taken by the appellant to resist the winding up E petition. Yet, all these objections could have been taken on a single application under two broad categories of procedural and substantive grounds of opposition to the respondent's petition. There would then have been just one judgment of the High Court dealing with all the points taken, and just the one appeal but mounted on several grounds. I must therefore say with much F regret that the case for the appellant was handled most poorly in the court below.

[24] In the instant case, the learned judicial commissioner has written quite a lengthy judgment in relation to the preliminary G objection. We note that the appellant did not file an appeal against that decision but has yet again raise more procedural issues when the petition came up once again for hearing on 12 April 1999, namely, on his right to be given an abridgment of time to file an affidavit in opposition as he did not receive any notification H from the High Court Registry informing him of that hearing date and hence "did not have the time fixed under r. 30(1) of the Companies Winding Up Rules (that is, 7 days before the hearing date of the petition, namely 12 April 1999) in order to file its affidavit in opposition to the petition".

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[25] In addition to the above, the appellant raise the issue that the petition was defective in that it was undated. The appeal record in this instant case only contained the learned judicial commissioner's grounds of decision with regards to the preliminary objection. Be that as it may, we noted that in the grounds of decision, the learned judicial commissioner has dealt with this issue. He said (at p. 23 of the appeal record):

> As regards the actual date of the petition the learned counsel for the petitioner said that the date of filing, ie, 26th November, 1998 shall be the date of the petition. This was accepted by this court.

[26] In the light of the above, and there being no appeal against that ruling by the court, we cannot fathom why the appellant has deem it fit to raise the same issue again in the court below at the hearing on 12 April 1999 and again at this appeal.

[27] In conclusion, we cannot see where the learned judicial commissioner has erred in refusing an adjournment of the hearing of the petition and proceeding to hear it and consequently granting the order of winding up. The petition showed that the appellant never disputed the debt. In *Maril-Rionebel (M) Sdn Bhd (supra)*, Gopal Sri Ram JCA said (at p. 260):

> But a petition for winding up is not execution, for a winding up petition is not based upon any judgment of a court. Normally, it is based on the inability of a company to pay its debts as and when they fall due. Such inability is normally evidenced by the company's inability to satisfy or compound a notice of demand issued pursuant to s. 218 of the Act. But the issuance of such a notice is not a sine qua non for the presentation of a winding up petition. What is needed is compelling evidence of the company's inability to pay its debt as and when they fall due. There are two cases that support this view.

[28] The learned judge then went on to refer to *Teck Yow Brothers Hand-Bag Trading Co v. Maharani Supermarket Sdn Bhd* [1989] 1 CLJ 258; [1989] 2 CLJ (Rep) 555 and *Taylors Industrial Flooring Ltd v. M & H Plant Hire (Manchester) Ltd* [1990] BCLC 216.

[29] In *Re Pek Chuan Development Pte Ltd* [1988] 3 MLJ 140, Chan Sek Keong JC said that as a general rule, winding-up proceedings should be heard expeditiously even where a company is solvent. We agree. In the instant case, the appellant was

already in breach of r. 30(1) of the rules when the petition came for hearing on 22 February 1999. The appellant cannot now complain that he has been deprived of his right to file an affidavit in opposition to the petition when the learned judicial commissioner disallowed his application for adjournment of the hearing on 12 April 1999.

[30] This was a unanimous decision. My learned brother Denis Ong Jiew Fook, JCA has perused this judgment in draft and has expressed his concurrence with the reasons herein. Our learned brother Arifin Jaka, JCA has since retired when this judgment was prepared and he did not have the benefit of reading it.